No. 97-1977

In The

Supreme Court of the United States

October Term, 1997

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, INC., C & H POWER LINE CONSTRUCTION, INC., CHRIS HUNT WATER HAULING, INC., JOHN VANCE MOTORS, INC. and TROY WESTNIDGE, INC.,

Petitioners,

v.

SELF INSURERS' MANAGEMENT GROUP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITIONER COLBERT NURSING HOME, INC.'S REPLY TO RESPONDENT OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.'S BRIEF IN OPPOSITION

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REPLY BRIEF OF JOINT PETITIONER COLBERT NURSING HOME, INC.

The Oklahoma Supreme Court treated as companion cases for purposes of appeal both of the appeals that are the subject of the instant Joint Petition For Certiorari (the "Petition"). It is not clear to what extent the Oklahoma Supreme Court based its opinion in the YWCA et al. Petitioners case involving Self Insurer's Management Group, Inc. ("SIMG"), on the arguments made in the Colbert Nursing Home ("Colbert") Petitioner's case involving Oklahoma Employers Safety Group, S.I.A. ("OESG"). The Oklahoma Supreme Court found the fact and legal issues were similar. Petition App. 16 and 17. Inasmuch as the Oklahoma Supreme Court used the Briefs in SIMG to dispose of OESG's Oklahoma Securities Act claim (App. 19), reference was made in the Joint Petition to briefs filed in both cases. However, the Respondents filed separate responses to the Petition, and this Reply will address new points raised by OESG in its Response (the "Response").

PROPOSITION I: THE MCCARRAN-FERGUSON ACT SHOULD NOT APPLY TO NULLIFY FEDERAL SECURITIES LAWS

In "Proposition I" OESG incorrectly argues that the Petition must be denied for lack of jurisdiction because Petitioners failed to preserve the issues raised herein and the Oklahoma Supreme Court did not pass judgment on the federal questions now before this Court. Respondent

OESG misstates the facts. The Oklahoma Supreme Court erroneously determined that based on the McCarran-Ferguson Act, the Securities Act of 1933 did not apply to the facts in dispute. Petition App. at p. 21. This issue was briefed in the trial court. Response App. at p. 9-12; Petition App. 64-68; Response App. 51-53; and Petition App. 70-72, 76-77; as well as in the briefs in the companion SIMG case.

OESG also incorrectly claims Colbert never presented a rebuttal argument against the application of the McCarran-Ferguson Act and that the Petition is the first time Colbert ever argued that Colbert was not "engaged in the business of insurance". This is not true. See Petition App. 66 (" . . . Colbert is not an insurance company . . . "). Further, at the trial court level Colbert responded to OESG's arguments regarding the McCarran-Ferguson Act by pointing out that the contract involved was not just a contract for insurance, but for participation in an insurance company with ownership attributes such as dividends, assessments for deficits and voting rights, and is subject to securities laws. Petition App. 64-68 and 70-72 (along with other cites to record in the preceding paragraph). The trial court's ruling confirmed Colbert's position. The parties were not permitted to file briefs in the appeal to the Oklahoma Supreme Court. However, it is clear that these issues were raised and encompassed in the Oklahoma Supreme Court's decision. Petition App. 20-22. Colbert again raised these arguments in the Petition For Rehearing. Petition App. 76 and 78.

OESG also quotes the Oklahoma Supreme Court's incorrect statement that Colbert failed to cite any authority supporting its federal securities laws claims. In the

Petition For Rehearing Colbert corrected the Court on this point. Petition App. 76-77. Colbert addressed this in the Petition at p. 8, fn.2.

Further, Colbert argued at the trial court that the amendment to Title 85, Section 149.1.C demonstrates the applicability of the Oklahoma Securities Act (Title 71 Oklahoma Statutes § 1, et seq.), which amendment came into effect *after* Colbert had asserted its counterclaim and defenses under the Oklahoma Securities Act. Colbert asked the trial court to take judicial notice of the proceeding in the SIMG case in making its determination in the OESG case. Petition App. 58-59. Colbert also asserted in its Petition for Rehearing that the Oklahoma Supreme Court's ruling constituted an impermissible destruction of a defense that existed in favor of Colbert and is not permissible under the United States Constitution. Petition App. 76. The issue is properly before this Court for consideration.

OESG incorrectly argues in its Proposition II that the Petitioners are asking the Court to ignore the McCarran-Ferguson Act. Petitioners are asking the Court to simply determine which of two federal acts applies to the instant facts, the Securities Act of 1933 or the McCarran-Ferguson Act. The Oklahoma Supreme Court determined the McCarran-Ferguson Act with 85 O.S. § 149.1 applies, to the exclusion of the Securities Act of 1933, and Colbert asks this Court to review that decision. OESG failed to show in the trial court or Oklahoma Supreme Court how compliance with *both* the Securities Act of 1933 *and* state workers compensation laws (regarding formation of associations) will invalidate, impair or supersede that state law. OESG treats the instant contracts to participate in the

associations as if they were ordinary contracts of insurance, and adopt the position that the McCarran-Ferguson Act mandates that this state law and the Securities Act of 1933 cannot co-exist. However, *Securities & Exchange Commission v. Republic National Life Insurance*, 378 F.Supp. 430, 437 (S.D.N.Y. 1974), held that "*National Securities* indicates that the MFA is to be narrowly construed in the face of valid federal regulatory interests: accommodation of federal and state regulatory interests is to be sought."

OESG's statement that "Congress created the McCarran-Ferguson Act for the sole purpose of allowing the individual states to create and regulate entities such as self-insurance associations" is a gross misstatement of the purpose behind enactment of the Act. The primary concern of Congress was with the relationship between insurance *ratemaking* and the *antitrust* laws, and with the power of the states to tax insurance companies. *Securities & Exchange Commission v. National Securities*, 393 U.S. 453, 458-459, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1968). Insurance ratemaking, antitrust laws, and state taxation are not issues in this case.

PROPOSITION II: THE OKLAHOMA SUPREME COURT'S RETROACTIVE APPLICATION OF A LEGISLATIVE AMENDMENT RENDERING STATE SECURITIES LAWS INAPPLICABLE TO A GROUP SELF-INSURER ASSOCIATION DIVESTED PETITIONERS OF A VESTED RIGHT TO A DEFENSE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

OESG misinterpreted case law regarding Colbert's vested right to an existing defense by improperly suggesting that a defense is only vested if it has been heavily

litigated on those specific facts. Both *Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District*, 464 P.2d 748, 755 (Okl. 1968) and *Resolution Trust Corporation v. Wright*, 868 F.Supp. 301, 304 (W.D.Okl. 1993), support Petitioner's position. Both cases state that a vested right may be created by either common law or statute. Colbert's vested right was created by the Oklahoma Legislature's enactment of the Oklahoma Securities Act. The Oklahoma Securities Act provides claims for relief and defenses to enforcement of contracts at 71 O.S. § 408(a) and (i). App. 42-44. *Resolution Trust Corporation* states that the accrual of a cause of action means the right to institute and maintain a suit, and whenever one person may sue another a cause of action has accrued which stands unaffected or lessened by legislative amendment. *Id.* at 304, 305. An accrued right may only be extinguished prospectively. *Id.* at 305. Thus, the Oklahoma Supreme Court improperly deprived Petitioner of a vested defense by retroactive application of the legislative amendment to 85 O.S. § 149.1.

Respectfully submitted,

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